Raja Segaran a/l S Krishnan v Bar Council Malaysia & Ors (No 3)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–23–93 OF 1999(3)
KAMALANATHAN RATNAM J
30 DECEMBER 2000

Evidence *— Privilege — Official communications — Proceedings of the Bar Council — Minutes of the Bar Council — Whether protected from disclosure — Meaning of 'secrecy' — Legal Profession Act 1976 s 76(2)*

Evidence *— Witness — Judge's calling of, where parties had not — No power to do so — Whether witness called by judge — Whether witness should be allowed to testify in the interest of justice*

Words and Phrases *— 'Secrecy' — Legal Profession Act 1976 s 76(2)*

This is the defendants' appeal against the court's decision ordering Mr R Rajasingam, a member of the Bar Council, to give evidence in respect of the proceedings and to produce such documents as are necessary to ensure that all relevant evidence is before the court for a just determination of all issues. It was submitted that a judge is not allowed in a civil action to call a witness whom he thinks might throw some light on the facts, without the consent of the parties. It was also submitted that, by virtue of s 76(2) of the Legal Profession Act 1976 ('the LPA'), 'secrecy' ought to be maintained in respect of all proceedings conducted by the Bar Council and the minutes of the Bar Council was protected from disclosure by the proviso to maintain secrecy. The plaintiff submitted that by virtue of s 162 of the Evidence Act 1950 ('the EA'), the court should inspect the minutes of the Bar Council meeting which passed the resolution to call for the EGM and if the court found the minutes relevant, the court should order for its admissibility.

Held, dismissing the appeal:

(1) The court did not call Mr R Rajasingam as a witness. He was called by the plaintiff. Whilst the court agreed fully that it is not the duty of the court to call a witness to testify, yet the court could not abrogate its duty, if a party seeks its indulgence to call a witness to testify. Notwithstanding the fact that these proceedings were pursuant to O 33 r 2 of the Rules of the High Court 1980, the court had, during the directions, given parties the right to adduce oral evidence by calling witnesses. Besides the defendants had agreed that the plaintiff was entitled to give evidence or to give notice. In the interest of justice it was pertinent and relevant to allow Mr R Rajasingam to testify (see p 311E, G).

(2) Since the plaintiff's case was that the resolution and the proposed EGM were contrary to the LPA, surely it is in the interest of justice that the plaintiff be allowed to call the very witness who

spoke to him on behalf of the Bar, to testify and if the said witness finds it necessary to do so, then to refer to the minutes of the meeting relating to the discussion by the Bar Council of the resolution and the proposed EGM (see p 315E–F).

(3) The claim to privilege by virtue of the proviso to maintain secrecy ought to be given a narrow and restrictive meaning and most sparingly exercised. The meaning of the word 'secrecy' given to s 76(2) of the LPA is that all decisions and discussions or resolutions passed that relate to investigations relating to the conduct or affairs (or complaints) against members of the Bar are matters that ought to be kept secret to protect the interest of such members lest the conduct or affairs of members or any complaints against any members be discussed by the Council or Committee members in the open (see pp 313C, 315D).

(4) Such secrecy as is referred to in s 76(2) of the LPA binds the parties inter se but does not bind the court and therefore any discussion, or any resolution passed or decision made on any issue is subject to the provisions of the EA whereby the relevant provisions for consideration ought to be ss 123 and 162(2) of the EA. There is nothing in the LPA that excludes the application of any section of the EA. The word 'secret' or 'secrecy' is not defined in the LPA. Therefore there is no other meaning that can be given to it other than what ought to be given to it as found in the EA (see pp 314D, 315H, 316C–D).

[**Bahasa Malaysia summary**

Ini adalah rayuan defendan terhadap keputusan mahkamah mengarahkan En R Rajasingam, seorang ahli Majlis Peguam, untuk memberikan keterangan berkenaan dengan prosiding-prosiding dan untuk mengemukakan dokumen-dokumen seperti yang diperlukan untuk memastikan bahawa semua keterangan yang relevan adalah di hadapan mahkamah untuk penemuan yang adil bagi semua isu-isu. Ia adalah dihujahkan bahawa seorang hakim di dalam tindakan sivil adalah tidak dibenarkan untuk memanggil seorang saksi yang beliau fikir mungkin memberikan keterangan berkenaan dengan fakta-fakta, tanpa persetujuan pihak-pihak. Ia adalah dihujahkan bahawa, menurut s 76(2) Akta Profesion Guaman 1976 ('APG'), 'kerahsiaan' sepatutnya dikekalkan berkenaan dengan semua prosiding-prosiding yang diadakan oleh Majlis Peguam dan minit Majlis Peguam adalah dilindungi daripada pendedahan menurut proviso untuk mengekalkan kerahsiaan. Plaintif menghujahkan bahawa menurut s 162 Akta Keterangan 1950 ('AK'), mahkamah sepatutnya memeriksa minit-minit mesyuarat Majlis Peguam yang meluluskan resolusi untuk memanggil EGM dan jika mahkmah mendapati minit-minit tersebut relevan, mahkamah patut mengarahkan kebolehterimaannya.

Diputuskan, menolak rayuan tersebut:

(1) Mahkamah tidak memanggil En R Rajasingam sebagai saksi. Beliau telah dipanggil oleh plaintif. Walaupun mahkamah bersetuju sepenuhnya bahawa ia bukanlah tugas mahkamah untuk memanggil saksi untuk memberi keterangan, namun mahkamah tidak boleh melepaskan tugasnya, jika suatu pihak meminta bantuan mahkamah untuk memanggil seorang saksi untuk memberi keterangan. Walau sekalipun fakta bahawa prosiding-prosiding tersebut adalah menurut A 33 k 2 Kaedah-kaedah Mahkamah Tinggi 1980, mahkamah telah, semasa memberikan arahan-arahan, memberikan pihak-pihak hak untuk mengemukakan keterangan lisan dengan memanggil saksi-saksi. Lagipun defendan-defendan telah bersetuju bahawa plaintif berhak untuk memberikan keterangan atau memberikan notis. Di atas kepentingan keadilan ia adalah berkaitan dan relevan untuk membenarkan En R Rajasingam untuk memberikan keterangan (lihat ms 311E, G).

(2) Oleh kerana kes plaintif adalah bahawa resolusi dan EGM yang dicadangkan adalah bercanggah dengan APG, tentu di atas kepentingan keadilan bahawa plaintif dibenarkan untuk memanggil saksi yang bercakap dengannya bagi pihak Majlis tersebut, untuk memberikan keterangan dan jika saksi tersebut merasakan ia adalah perlu, kemudian merujuk kepada minit-minit mesyuarat berkenaan dengan perbincangan oleh Majlis Peguam berkenaan dengan resolusi dan EGM yang dicadangkan (lihat ms 315E–F).

(3) Tuntutan kepada perlindungan menurut proviso tersebut untuk mengekalkan kerahsiaan sepatutnya diberikan suatu maksud yang sempit dan terhad dan jarang digunakan. Perkataan 'rahsia' yang diberikan kepada s 76(2) APG adalah bahawa semua keputusan-keputusan dan perbincangan-perbincangan atau resolusi-resolusi yang diluluskan yang berkaitan dengan siasatan-siasatan berkenaan perjalanan atau hal ehwal (atau aduan) terhadap ahli-ahli Majlis adalah perkara-perkara yang sepatutnya dirahsiakan untuk melindungi kepentingan ahli-ahli tersebut untuk mengelak tindakan atau hal ehwal ahli-ahli atau sebarang aduan-aduan terhadap mana-mana ahli dibincangkan oleh Majlis atau ahli Jawatankuasa secara terbuka (lihat ms 313C, 315D).

(4) Kerahsiaan sedemikian yang dirujuk di dalam s 76(2) APG mengikat antara pihak-pihak tetapi tidak mengikat mahkamah dan dengan itu sebarang perbincangan, atau sebarang resolusi yang diluluskan atau keputusan yang dibuat ke atas sebarang isu adalah tertakluk kepada peruntukan-peruntukan AK di mana peruntukan-peruntukan yang relevan untuk dipertimbangkan sepatutnya adalah ss 123 dan 162(2) AK. Tiada apa-apa di dalam APG yang mengecualikan pemakaian sebarang seksyen AK. Perkataan 'rahsia' atau 'kerahsiaan' tidak didefinasikan di dalam

APG. Oleh itu tidak terdapat maksud yang lain yang boleh diberikan selain daripada apa yang patut diberikan kepadanya yang didapati di dalam AK (lihat ms 314D, 315H, 316C–D).]

Notes

For cases on privilige, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1706–1739.

For cases on witness, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2053–2193.

Cases referred to

Federal Commissioner of Taxation v Nestle Australia Ltd 69 ALR 445 (refd)

Kho Ah Soon v Duniaga Sdn Bhd [1996] 2 MLJ 181 (refd)

Lim Ker v Chew Seok Tee [1967] 2 MLJ 253 (refd)

Robinson v State of South Australia (No 2) [1931] AC 704 (refd)

State of Uttar Pradesh, The v Raj Narain & Ors [1975] AIR SC 865 (refd)

Takong Tabari v Government of Sarawak & 3 Ors [1994] 3 AMR 2768 (refd)

Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433 (refd)

Wako Merchant Bank (Singapore) Ltd v Lim Lean Heng & Ors [2000] 3 MLJ 401 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 s 97

Evidence Act 1872 ss 123, 162 [India]

Evidence Act 1950 ss 123, 162

Income Tax Assessment Act 1936 s 16(2) [Aust]

Legal Profession Act 1976 s 76(2)

Official Secrets Act 1972 s 16A

Rules of the High Court 1980 O 33 r 2

Wheat Harvest Acts 1915–17 [Aust]

DP Vijandran (*Raja Segaran & Assoc*) for the plaintiff.

Dhinesh Bhaskaran (*G Rajasingam*) (*Shearn Delamore & Co*) for the first and third defendants.

Malik Imtiaz Ahmed bin Ghulam Sarwar (*Malik Imtiaz Sarwar*) for the second defendant.

Kamalanathan Ratnam J. : The facts relating to this case have been narrated fully in my earlier judgment (see [2000] 1 MLJ 1). Subsequently, the plaintiff filed an application pursuant to O 33 r 2 of the Rules of the High Court 1980 ('the RHC'), which allowed the court to order any question or issue arising in a cause or matter, whether of fact or law, or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried, before, at or after the trial of the cause or matter and

which also permitted the court to give directions as to the manner in which the question or issue was to be stated. The defendants opposed the said application. On 5 September 2000, I gave an oral decision in which I allowed the plaintiff's application and formulated the question to be tried. In a written judgment dated 2 November 2000 (yet unreported) bearing the same intitlement as the reported judgment but marked (2) I had said at p 9 as follows:

> … I would have thought that the defendants would have realized that it is a requirement of the law to satisfy me in their affidavit itself, with evidence, instead of saying that they would adduce such evidence at trial. This is more so when the plaintiff had put in this application for leave to decide the issue on affidavit evidence. In any case, in spite of the defendants' obvious error in judgment, this court indeed gave the defendants a second bite at the cherry, in that I had ruled that if parties see the need to, they can adduce oral evidence.

On 26 September 2000, the defendants applied for a stay of all proceedings (encl 71) pending the hearing and final determination of the defendants' application for leave to appeal to the Federal Court against the decision of the Court of Appeal given on 12 July 2000. During the course of his submission on this application, En Malik for the second defendant asked me to put on record that the reason all the defendants were not calling witnesses was because there is an appeal against my order dated 5 September 2000. Having put that request on record, I also recorded as follows:

> Court:
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> I must put you on notice that this appeal does not preclude you from calling witnesses if you so require.

The appeal

This is the defendants' appeal against my decision made on 9 October 2000, whereby I ordered that Mr R Rajasingam do give evidence in respect of these proceedings, and to produce such documents as are necessary to ensure that all relevant evidence is before this court for a just determination of all issues.

Findings of the court

Since I had, in my written judgment dated 2 November 2000, allowed for the case to proceed under O 33 r 2 of the RHC read together with r 5, and also formulated the question to be argued, I had also ordered that parties, if they wished, would be permitted to adduce oral evidence; otherwise the case was to proceed based on the pleadings, the affidavits filed, and the statement of agreed facts, which I had marked as 'B', with costs to be in the cause.

During the course of his submission, Mr Dhinesh Bhaskaran for the first and third defendants referred me to the case of *Lim Ker v Chew Seok Tee* [1967] 2 MLJ 253 (FC) which held that a judge is not allowed, in a civil

action, to call a witness whom he thinks might throw some light on the facts, without the consent of the parties. However, he conceded that in respect of Mr R R Chelvarajah who is already a witness, the position is as said in *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 at p 435. By referring to Mr RR Chelvarajah as being a witness, I take it that Mr Dhinesh meant that since Mr RR Chelvarajah had affirmed an affidavit, it was open to the plaintiff to give notice to cross examine him, as was suggested by the court in *Tahansan*. En Malik agreed with this proposition and even pointed out that the principle suggested in *Tahansan* was accepted by our Federal Court in *Kho Ah Soon v Duniaga Sdn Bhd* [1996] 2 MLJ 181 which held that a court should decide only on consideration of undisputed facts in affidavits and not on credibly denied allegations in the absence of oral evidence and cross examination.

Mr Vijandran, whilst agreeing with the proposition of the law as espoused by the defence, and pointing out that since all parties were trying to get at the truth of the matter and the issues involved being very serious and being of the greatest importance to the Bar, and the judiciary, argued that it was necessary to put before the court all relevant facts. He thus applied to be allowed to call to testify:

(1) the plaintiff;

(2) Mr R Rajasingam, a member of the Bar Council.

He also gave notice that he intended to cross examine Mr RR Chelvarajah on his affidavit and promised to limit the cross examination to the issues in dispute. In response, Mr Bhaskaran agreed that the plaintiff was entitled 'to call evidence or to give notice'. However, he pointed out that because of the appeal filed against my decision given on 5 September 2000, the defendants did not wish to call evidence and further he was personally of the view that the documents already before the court were sufficient to resolve the issues before the court. Mr Bhaskaran then added a rider which I quote verbatim, 'But if witnesses are called we will to a limited extent, participate in that cross examination for the purposes of ensuring that we are not deemed to have admitted or to have accepted the evidence.' En Malik agreed to this.

From the letter requesting for the notes of evidence, I gather that the defendants' appeal relates only to my allowing Mr R Rajasingam to be called as a witness and to produce relevant documents. There is no objection to both Mr R R Chelvarajah and Mr Raja Segaran having given evidence.

To consider the defendants' objection, it is necessary to look into the facts in *Lim Ker*. In that case, the plaintiff obtained judgment against the defendant in the Sungei Patani Sessions Court, and in execution of the decree attached a house No 7-B, Kampong Bharu Lunas. One Chew Seok Tee ('the objector') objected to the attachment on the grounds that she was the owner of the said house. She gave evidence before the Sessions Court that she had much earlier purchased the house from the defendant who had given her a document of sale which was tendered in court as an exhibit. After the objector had closed her case and no evidence having been adduced by the plaintiff and no witnesses called by him, the learned President then

on his own volition called a witness and examined him in length and then dismissed the objection. On this the Federal Court said at p 254:

> The learned judge held that such practice was highly undesirable and could lead to a miscarriage of justice. I am in full agreement with him. It was held in *In re Enoch and Zaretzky, Bock & Co's Arbitration* ([1910] 1 KB 327) that:
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> > 'Neither a judge nor an umpire has any right to call a witness in a civil action without the consent of the parties.'
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> And in the case of *Jones v National Coal Board* ([1957] 2 QB 55, 64) Denning LJ (as he then was) said:
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> > 'So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties:'

In my opinion, the learned judge had come to the right decision in allowing the appeal of the objector and the appeal by the appellant to this court was therefore dismissed with costs here and in the courts below.

I do not think that the objection taken by the defence is sustainable. I did not call Mr R Rajasingam as a witness. He was called by the plaintiff and I repeat what I said when I made my decision allowing the plaintiff's application:

> As the court wishes to have the full and true facts before it, I will exercise my discretion and allow the plaintiff's application as made.

Whilst I agree fully that it is not the duty of the court, however much it sympathises with a party, or however much it perceives that the calling of a particular witness might throw light upon the case, and then to call that witness to testify, yet the court cannot abrogate its duty, if a party seeks its indulgence to call a witness to testify. If a judge is of the view that notwithstanding the fact that neither party had called an important witness whose evidence might clearly shed light to the case, the judge has to obtain the consent of both parties if he wants that witness to testify. But the moment any party objects, then the judge cannot call that witness on his own notwithstanding the fact that such a witness' evidence would be crucial to the case. However, that is not the situation in the case before me. Notwithstanding the fact that these proceedings were pursuant to O 33 r 2 of the RHC, I had, during the directions, given parties the right to adduce oral evidence by calling witnesses. Besides, the defendants had agreed that the plaintiff was entitled 'to call evidence or to give notice'. Having considered all arguments I was of the view that in the interest of justice it was pertinent and relevant to allow Mr R Rajasingam to testify.

On 3 October 2000, Mr R Rajasingam took the witness stand to testify. During the course of his evidence Mr R Rajasingam raised s 76(2) of the Legal Profession Act 1976 ('the LPA') and said that in the light of that subsection he was unable to answer any further questions.

Section 76(2) of the LPA

Parties then requested for an adjournment to do further research on this subsection. I then adjourned proceedings to 9 October 2000.

This sub-s (2) reads as follows:

> (2) Except and in so far as may be necessary for the purpose of giving effect to any resolution passed or decision made, secrecy shall be maintained in all proceedings conducted by the Bar Council, the State Bar Committee, the Inquiry Committee and their staff.

En Malik then informed the court that he had specific instructions to object to any evidence being led of that particular Bar Meeting based on s 76(2) of the LPA as the Bar itself is a party to this action.

The question posed to the court was as follows:

> Whether the provision of s 76(2) prevents any witness from giving evidence in court as to any proceedings of the Bar Council and to produce documents relating to the proceedings of the Bar Council?

It is trite law that the courts go to great lengths to ensure that all available relevant evidence is before them so that the courts can arrive at a just decision. Mr Vijandran drew the court's attention to s 162 of the Evidence Act 1950 which reads as follows:

> 162 Production of documents and their translation
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> (1) A witness summoned to produce a document shall, if it is in his possession or power, bring it to court notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the court.
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> (2) The court, if it sees fit, may inspect the document unless it refers to affairs of State, or take other evidence to enable it to determine on its admissibility.
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> (3) If for such a purpose it is necessary to cause any document to be translated, the court may, if it thinks fit, direct the translator to keep the contents secret unless the document is to be given in evidence, and if the translator disobeys the direction, he shall be held to have committed an offence under s 166 of the Penal Code.

He therefore urged me in the light of this section to inspect the minutes of the Bar Council meeting which passed the resolution to call for the EGM and that if the court found the minutes relevant, the court should order for its admissibility.

It was the defendants' contention that 'secrecy' ought to be maintained in respect of all proceedings conducted by the Bar Council, the State Bar Committee, the Inquiry Committee and their staff and that therefore the minutes of the Bar Council was protected from disclosure by the proviso to maintain secrecy.

In *Robinson v State of South Australia (No 2)* [1931] AC 704, the appellant brought an action in the Supreme Court of South Australia against the respondent state claiming damages for alleged negligence in the care of wheat placed in the control of the state under the Wheat Harvest Acts 1915–17. Upon an order for discovery the respondent state, by an affidavit made by a civil servant, claimed privilege in respect of 1892 documents tied in three bundles, and stated to be state documents,

comprising communications between officers administering the department concerned; there was exhibited to the affidavit a minute by the responsible minister stating, inter alia, that disclosure of the documents would be contrary to the interests of the state and of the public. The Privy Council said at p 714 as follows:

> As the protection is claimed on the broad principle of State policy and public convenience, the papers protected, as might have been expected, have usually been public official documents of a political or administrative character. Yet the rule is not limited to these documents. Its foundation is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official, which alone is no reason for their non-production.

It seems to me that this claim to privilege by virtue of the proviso to maintain secrecy, ought to be given a narrow and restrictive meaning and most sparingly exercised. In fact in *Robinson v State of South Australia* the Privy Council went on to say at p 716 as follows:

> … In truth the fact that the documents, if produced, might have any such effect upon the fortunes of the litigation is of itself a compelling reason for their production - one only to be overborne by the gravest considerations of State policy or security.

In Malaysia, s 123 of the Evidence Act 1950 reads as follows:

> 123 Evidence as to affairs of State
> No one shall be permitted to produce any unpublished official records relating to affairs of State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold permission as he thinks fit, subject, however, to the control of a Minister in the case of a department of the Government of Malaysia, and of the Chief Minister in the case of a department of a State Government.

Again it would seem that secrecy relates to 'affairs of state'. In fact the rationale behind the protection of secrecy given to 'affairs of state' is well explained in the Indian Supreme Court case of *The State of Uttar Pradesh v Raj Narain & Ors* [1975] AIR SC 865. The court held that the foundation of the law behind ss 123 and 162 of the Indian Evidence Act 1872 (which are pari materia to ss 123 and 162 of our Evidence Act 1950), and which is similar to that as in English law, is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest. The court also held that public interest which demands that evidence be withheld, is to be weighed against the public interest in the administration of justice in that the courts should have the fullest possible access to all relevant materials. The court made a very pertinent finding in that, it held that confidentiality is not a head of privilege. It is a consideration to bear in mind. To my mind, confidentiality and secrecy are synonymous, and so the same principles that bind the court's view in respect of confidentiality should equally bind the court's view in respect of a claim of secrecy. In *Takong Tabari v Government of Sarawak & 3 Ors* [1994] 3 AMR 2768, my learned brother Richard Malangum J held that the Official Secrets Act 1972 ('the OSA') is not a

statute which governs the admissibility of evidence, and that the issue of admissibility of any piece of evidence in a court of law falls under the Evidence Act 1950. In that case the defendants claimed confidentiality from producing certain relevant documents the plaintiff required. The defendants pleaded s 16A of the OSA which provided for a certificate to be issued by a Minister or a public officer charged with any responsibility in respect of any Ministry, department or any public service or the Menteri Besar or the Chief Minister of a State or by the principal officer in charge of the administrative affairs of a State, certifying to an official document, information or material, that it is an official secret, and once that certificate is produced it shall not be questioned in any court on any ground whatsoever. Even in a situation such as this the court went on to hold that s 16A of the OSA is not intended to prohibit in court, the admissibility of a document certified as an official secret. The court held that a document is not excluded from being disclosed in court on the basis of a certificate certifying that the said document is an official secret. I totally agree with the view expressed by my learned brother in that it is the Evidence Act that determines the admissibility of any evidence in a court of law and in the case before me the relevant provisions for consideration ought to be ss 123 and 162(2) of the Evidence Act. Another material fact that I ought to bear in mind is that there is nothing in the LPA that excludes the application of any section of the Evidence Act. In *Wako Merchant Bank (Singapore) Ltd v Lim Lean Heng & Ors* [2000] 3 MLJ 401, Abdul Aziz bin Mohamad J had to consider the effect of evidence obtained in contravention of s 97 of the Banking and Financial Institutions Act 1989. It is relevant to cite the passages indicating his summarization of s 97. This is what his Lordship said at pp 405–406:

> Section 97
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> Subsection (1), read with s 103, makes it an offence to disclose to any person any information or document relating to the affairs or account of a customer of a financial institution, which includes a bank. The persons liable for the offence are a director and an officer of the licensed institution, and any person who has access to any document or material relating to the affairs or account of the customer. Subsection (3), read with s 103, makes it an offence to make further or onward disclosure of any information or document disclosed in contravention of sub-s (1). The person liable for the offence is a person who has the information or document and knows that it has been disclosed in contravention of sub-s (1). The private investigator in this case, in disclosing in his affidavit the information about the bank accounts, risked committing an offence under sub-s (3) if to his knowledge the information had originally been disclosed in contravention of sub-s (1).
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> Subsection (1) of s 99 lays down certain exceptions. The effect of the exceptions is that a disclosure falling within the exceptions is not an offence under s 97. Exception (a) is where the customer has in writing permitted the disclosure. Exception (d) is for disclosure in certain civil proceedings, which do not include the Mareva injunction applications in this case.
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> It is obvious that the intention of Parliament in enacting s 97 is to protect the secrecy of the affairs and account of a customer of a financial institution as such a customer, but, in giving effect to that intention, Parliament has gone only to the extent of creating offences of the prohibited disclosures.

Parliament has not gone further to deal with the question of the admissibility or otherwise in criminal or civil proceedings of any information or document disclosed in contravention of s 97, which is a matter of the law of evidence, where the law is that evidence illegally obtained is nonetheless admissible if relevant. See *Ramli bin Kechik v Public Prosecutor* [1986] 2 MLJ 33 at p 38. In sub-ss (2) and (3) of s 99 there is an indication of the depth of Parliament's concern to protect the secrecy of a customer's affairs and account. Subsection (2) allows to be held in camera civil proceedings in which, by virtue of sub-s (1), it will not be an offence to disclose any protected information or document, and, read with s 103, makes it an offence, if the proceedings are held in camera, for any party to the proceedings to disclose to any other person any information or document disclosed in the proceedings. Subsection (3), read with s 103, makes it an offence for any person to publish the identity of 'any parties to such civil proceedings as are referred to in sub-s (2)'. But as I said, Parliament has not gone so far as to deal with the admissibility of any information or document criminally disclosed under s 97 or s 99(2).

In the light of the above views of my learned brothers, it is not incorrect for me to hold that the meaning of the word 'secrecy' given to s 76(2) of the LPA is that all decisions and discussions or resolutions passed that relate to investigations relating to the conduct or affairs (or complaints) against members of the Bar are the matters that ought to be kept secret to protect the interest of such members lest the conduct or affairs of members or any complaints against any members be discussed by the Council or Committee members in the open.

The complaint of the Bar was that I had allowed Mr R Rajasingam, a Council member, to testify in respect of the meeting held wherein the resolution and the proposed EGM, the subject matter of this very suit, were discussed and that I had allowed Mr R Rajasingam to refer to the minutes of the said meeting. Since the plaintiff's case is that the resolution and the proposed EGM are contrary to the LPA, surely it is in the interest of justice that the plaintiff be allowed to call the very witness who spoke to him on behalf of the Bar, to testify and if the said witness finds it necessary to do so, then to refer to the minutes of the meeting relating to the discussion by the Bar Council of the resolution and the proposed EGM.

Encik Malik urged me to apply the literal interpretation to the meaning of the word 'secrecy' as referred to in s 76(2) of the LPA unless, he said 'there is any unreasonableness in applying it literally'. I agree with this proposition. The common meaning of the word secrecy is well known. But as rightly said by En Malik where it is unreasonable to apply the literal meaning, the court must decline to do so. Here the word 'secret' or 'secrecy' is not defined in the LPA. Therefore there is no other meaning that can be given to it other than what ought to be given to it as found in the Evidence Act and I have dealt with this exhaustively.

Encik Malik argued that secrecy in its ordinary meaning means 'to keep hidden'. Therefore, he said sub-s (2) to s 76 speaks for itself. What has not been explained is, since the resolution and the proposed EGM have been circulated what else is there 'to keep hidden'. Arguing that the words in s 76(2) of the LPA are wide En Malik urged me to apply the decision of the Federal Court of Australia in *Federal Commissioner of Taxation v Nestle*

Australia Ltd 69 ALR 445. The question that arose there was as to whether s 16 of the Income Tax Assessment Act 1936 rendered the documents in the possession of the Commissioner relating to his investigation of the taxpayer's affairs immune from the process of discovery and inspection. Section 16(2) of the said Act reads as follows:

> (2) Subject to this section, an officer shall not either directly or indirectly, except in the performance of any duty as an officer, and either while he is, or after he ceases to be an officer, make a record of, or divulge or communicate to any person any information respecting the affairs of another person acquired by the officer as mentioned in the definition of 'officer' in sub-s (1).

In any case, the decision of the court does not favour the argument of En Malik. The court held that the prohibition imposed by s 16(2) of the Income Tax Assessment Act is against divulging or communicating information to 'any person' and this could not apply to a court. Applying the same literal meaning to be given to s 76(2) of the LPA it is my judgment that such secrecy as is referred to in s 76(2) binds the parties inter se in respect of the matters I had earlier referred to, but does not bind the court and that therefore any discussion, or any resolution passed or decision made on any issue is subject to the provisions of the Evidence Act 1950. As to the fear of En Malik that a Council member or any other relevant party referred to in s 76 could be punished under s 94(3)(k) for breaching any provision of the LPA, namely, s 76(2), perhaps this decision ought to give solace and comfort.

Having heard full arguments and having read the authorities submitted I allowed the plaintiff's request that Mr R Rajasingam be allowed to give evidence in respect of these proceedings and to produce such documents as are necessary to ensure that all relevant evidence is before this court for a just determination of all issues.

Finally, in passing, I wish to add that this appeal, in my view, amounts to an abuse of process as what I made was a decision and it ought not to have been taken specifically as an appealable issue at this stage of the proceedings. If the defendants were successful in the final outcome they could have cross-appealed on this issue and if they were unsuccessful in the final outcome, then they ought to have taken this as one of the grounds of appeal. In my oral decision I did not consider the issue of costs. I now order costs of these proceedings as costs in the cause.

Appeal dismissed.

Reported by Jafisah Jaafar